U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: FEB 17 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a non-profit ethnic music society. It seeks to employ the beneficiary permanently in the United States as a Chinese music director, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, Form ETA 750, Application for Alien Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established that it has had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that it has the ability to pay the beneficiary's proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) further states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial

> officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has had the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form ETA 750 was accepted for processing on December 1, 2003, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is $48,630 per year. Part B of the Form ETA 750, signed by the beneficiary on November 24, 2003, does not indicate that he has worked for the petitioner, however subsequent evidence indicates that the petitioner employed him in 2008.

Part 5 of the I-140, Immigrant Petition for Alien Worker, filed on April 22, 2008, states that the petitioner was established on August 20, 1999 and claims to employ eight workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

The record of proceeding contains a copy of IRS Form W-2 reflecting wages paid by the petitioner to the beneficiary for 2008 only as shown in the table below.

- In 2008, the Form W-2 stated total wages of $14,183.75, which is $34,446.25 than the proffered wage.

In order to demonstrate its ability to pay the full proffered wage during a given period, the petitioner must show that it can pay the difference between the proffered wage and any wages actually paid to the beneficiary. The petitioner did not submit any other Forms W-2 for the beneficiary for 2003, 2004, 2005, 2006, and 2007. In subtracting the total wage amount $14,183.75 paid in 2008 from the proffered wage amount of $48,630, there is a difference of $34,446.25.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, as asserted by the petitioner's accountant in this case, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record contains copies of the petitioner's Form 990-EZ, Return of Organization Exempt from Income Tax. The returns indicate that the petitioner's fiscal year is a standard calendar year. Line 18, demonstrate its excess (or deficit) for 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2003, the Form 990-EZ stated net revenue is $49,245.
- In 2004, the Form 990-EZ stated net revenue is $443.
- In 2005, the Form 990-EZ stated net revenue is $1,623.
- In 2006, the Form 990-EZ stated net revenue is $3,107
- In 2007, the Form 990-EZ stated net revenue is $3,927

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net revenue to pay the full proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It is noted that the Form 990-EZ does not permit a filer to identify its net current assets. In order to establish its net current assets in this case, the petitioner would have needed to have submitted audited balance sheets. However, the record does not contain such evidence. The record contains unaudited financial statements covering 2003, 2004, and 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that on appeal, counsel has submitted copies of certificates of deposit accounts opened at two different banks in 2003[1] and 2005, respectively. The amounts are for approximately $50,000. It is noted that the petitioner's Forms 990-EZ include one entry on line 22 (cash, savings and investments) of approximately $50,000 increasing to approximately $60,000 in 2007. This cash figure represents current assets that have not yet been reduced by current liabilities, which may apply. Bank statements generally reflect only a portion of a petitioner's financial profile and are not indicative of other encumbrances affecting its position and are not an acceptable substitute for the required evidence over a prolonged period. Accordingly, even if these cash figures were considered by the AAO, and even assuming zero current liabilities, after applying this figure to the proffered wage in 2003, the petitioner would still fail to establish continuing financial ability to cover the full proffered wage in 2005, 2006, 2007 and fail to cover the difference between actual wages paid and the full proffered wage in 2008 based on this asset.[2]

Accordingly, for the years 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary.[3]

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[1] The certificate of deposit opened in 2003 matured in November 2005. Whether the separate certificate of deposit opened in November 2005 at a different bank represents these same funds or different funds is unclear. From the evidence before us, we are unable to conclude that the two certificates represent separate funds as opposed to matured funds deposited at a separate bank. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[2] The record also contains a copy of a bank letter, dated September 20, 2007, reflecting a checking account balance of $83,240.85. There has been no evidence submitted to demonstrate that the funds reported in this account somehow reflects additional available funds that were not reflected on its corresponding 2007 tax return(s), such as within the calculation of the petitioner's excess or (deficit) for the year on line 18.

[3] This calculation does not include total assets. A petitioner's total assets include depreciable assets that the petitioner uses in its operation. Those depreciable assets will not be converted to cash during the ordinary course of operation and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. All of the end-of-year cash figures (with the exception of 2006) nevertheless do not equal or exceed the proffered wage.

Furthermore, any suggestion that the petitioner's end-of-year cash figures should be added to its excess revenue in calculating the funds available to the petitioner to pay the proffered wage is not persuasive. That calculation would be inappropriate because some of its excess revenue, after paying expenses, will be retained as cash. Adding the petitioner's end-of-year cash to its excess revenue would likely be duplicative, at least in part.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel additionally asserts that the beneficiary was paid the proffered wage in 2008 based on a prorated figure because he did not begin to work for the petitioner until September. Counsel cites a *Memorandum by William R. Yates, Associate Director of Operations,* "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), in support of the petitioner's continuing ability to pay the proffered wage. That memorandum advised adjudicators of three methods by which the ability to pay should be evaluated. With respect to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.[4] Further, it is noted that the Yates Memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates memorandum based on a three-month employment of the beneficiary, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is December 1, 2003, as established by the labor certification. Further, USCIS will only prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs for 2003, the year of the priority date. Here, the record contains only a 2008 Form W-2. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, without audited balance sheets, the petitioner's net current assets have not been established, and it has not been established that such assets were available to pay the proffered wage at any time beginning on the priority date.

[4] *See also, Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968).

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry.

In this matter, the overall circumstances do not establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted sufficient evidence to establish that it had the ability to pay the proffered wage in 2004, 2005, 2006, 2007 or 2008 and no facts paralleling those in *Sonegawa* are present to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. None of the tax returns for 2003 through 2007 showed any any salaries paid despite the statement on the Form I-140 that the petitioner has eight employees. In 2004, the petitioner's total revenue of $37,213 was less than the total proffered wage. Similarly, in 2005, the petitioner's total revenue of $5,348 was far less than the proffered wage of $48,630. Accordingly, the petitioner has not established that totality of the circumstances demonstrate that it could pay the proffered wage beginning on the priority date.

Beyond the decision of the director,[5] the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with five years of qualifying

[5] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

employment experience. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).[6]

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have a Master of Music in performance/piano and must have five years of experience in the job offered as a Chinese music director or five years of work experience in a related occupation defined as "public performance experiences."

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he claimed the following positions:

1. Assistant Entertainment Director (40 hours per week) employed by the [redacted] from January 1990 to May 1991.

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[6] The regulation at 8 C.F.R. § 204.5(k)(3) provides in pertinent part:

> (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> (A)An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B)An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

2. Public Performances (no hours worked given, no location given, no employer listed) as a piano soloist/piano accompanist from December 1991 to present (date of signing of ETA 750 /November 24, 2003).
3. Piano Instructor-Graduate Studies (20 hours per week) employed by the [redacted] from 1995 to 1998.
4. Database and Network Administration (40 hours per week) employed by [redacted] June 2002 to the date of signing.

In support of the beneficiary's five years of full-time qualifying experience in the job offered as a Chinese music director or five years of full-time experience of public performance experiences, the petitioner submitted a letter, dated December 20, 2007, from [redacted]. The letter states that the beneficiary served as a Teaching Fellow for the period of the Fall 1995 to Spring 2001 for the College of Music. [redacted] described his duties as including teaching private and group music lessons, undergraduate keyboard, and "organizing student recitals and other performances."

Since the letter does not support five years of full-time experience as a Chinese music director, it is considered in the context of five years in public performance experiences. The letter fails to document how, as a teaching fellow at [redacted] that the beneficiary accrued five full-time years of public performance experiences. It is noted that on Part B of the ETA 750, the beneficiary claims part-time, not full-time employment, for the University from 1995 to 1998. Copies of a number of other certificates related to performances and awards, have been submitted, however, those would not establish five years of full-time experience of performances. None of the certificates would show more than a day, or possibly an hour or so of performance. The petitioner's evidence has not established the beneficiary's qualifying experience as required by the certified labor certification. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.